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Supreme Court, U.S.
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No. 94-2042

In The

Supreme Court of the United States

October Term, 1995

ROSEBUD SIOUX TRIBE, THE UNITED STATES FOR THE USE AND BENEFIT OF THE ROSEBUD SIOUX TRIBE,

Petitioner,

v.

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, INC., FREDERICK L. VALANDRA, and RONALD McDONALD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1989, the parties entered into a construction contract, which contained an arbitration clause. The contract provided

> "[a]ll questions of dispute under this agreement shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."

Does the arbitration clause, by which the parties agreed to submit particular disputes to a particular forum in accordance with particular rules, waive the Tribe's sovereign immunity?

STATEMENT OF THE CASE

Certain portions of the Petitioner's Statement of the Case contain references to matters that are not part of the settled record. Enumerated below, Respondents request those matters not be considered by this Court in this proceeding.

Petitioner, in the fifth paragraph of its Statement of the Case, asserts that Respondents breached the subject construction contract, enumerating four reasons. The enumerated reasons are not part of the settled record, but rather, a summary of allegations from the Petitioner's pleadings, and should not be considered by this Court.

In the eleventh paragraph of its Statement of the Case, the Petitioner explains its reasons for dismissing its complaint against the Respondents. The enumerated reasons are not part of the settled record, but rather, an editorial statement by Petitioner, and should not be considered by this Court.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT FOLLOWED THIS COURT'S DECISIONS.

The Eighth Circuit Court of Appeals did not depart from this Court's rulings regarding sovereign immunity of Indian tribes. The Eighth Circuit, at page 562 of its opinion in the subject case, *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir.1995), recognized that

suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation, and that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " The Eighth Circuit relied on this Court's governing opinions. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969))). The Eighth Circuit did not establish new standards regarding waiver of sovereign immunity.

Petitioner contends the subject Eighth Circuit decision sanctions implied waivers of sovereign immunity. That is simply not the case. In its decision, the Eighth Circuit ruled that the subject arbitration provision was a clear and unequivocal waiver of sovereign immunity. The Eighth Circuit properly concluded that a written agreement to submit Tribal-contractor disputes to a particular forum for resolution according to particular rules was an express waiver of sovereign immunity, the only conclusion that gives any effect to the arbitration clause.

As the Supreme Court of Alaska recognized in holding that an almost identical arbitration clause waived tribal sovereign immunity, "any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity." *Native Village of Eyak v. G. C. Contractors*, 658 P.2d 756, 760 (Alaska 1983). In other words, the arbitration clause "would be meaningless if it did not constitute a waiver." *Id.*

Following the reasoning of the Alaska court, the Eighth Circuit observed that the subject arbitration clause was meaningless if it did not constitute a waiver, holding, at 50 F.3d at 562:

> "By definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense."

The Tribe does not contend that any other construction of the arbitration clause would make sense, but rather that the Eighth Circuit's construction of the clause – the only meaningful and logical construction – is a forbidden implied waiver.

The Eighth Circuit's decision is no different than its own widely followed decisions that a "sue and be sued" clause in a tribal charter expressly waives sovereign immunity. *See Rosebud Sioux Tribe v. A & P Steel,* 874 F.2d 550, 552 (8th Cir. 1989). Like the subject arbitration clause, "sue and be sued" clauses do not expressly say "the tribe hereby waives its sovereign immunity," but this Court has never required any such language. *See Rosebud Sioux Tribe,* 50 F.3d at 563 (noting that this Court "has never required the invocation of 'magic words' "). The Eighth Circuit's decision does not sanction, by general rule or particular application, implied waivers of sovereign immunity. Rather, it recognizes the arbitration clause for what it is – an express waiver of sovereign immunity.

II.

THE EIGHTH CIRCUIT DECISION IS CONSISTENT WITH OTHER STATE COURT DECISIONS.

Val-U Construction is aware of only three other cases expressly considering an arbitration clause a waiver of tribal immunity. In *Native Village of Eyak,* the Alaska Supreme Court held a construction contract clause requiring that disputes "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association" was an express waiver. 658 P.2d at 760-61. *Accord Hydaburg Co-op. Ass'n v. Hydaburg Fisheries,* 826 P.2d 751, 754-55 (Alaska 1992). In *Val/Del, Inc. v. Superior Court,* 703 P.2d 502, 508-09 (Ariz. Ct. App.), *cert. denied,* 474 U.S. 920 (1985), the Arizona Court of Appeals held a contract arbitration clause requiring disputes "be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association" was an express waiver. In *Pan American Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418-19 (9th Cir. 1989), as the Tribe argues, the Ninth Circuit Court of Appeals held otherwise.

Only one state court of last resort and two federal courts of appeal have addressed the question presented since this Court denied certiorari in *Val/Del,* ten years ago. The paucity of reported cases suggests that the Eighth Circuit decision does not present an important issue of federal law requiring this Court's attention, and that the law is hardly "in a state of considerable confusion." (Pet. Writ Cert. at 9.) No compelling reason exists why this Court should use this case to review a 1989 decision of the Ninth Circuit Court of Appeals.

CONCLUSION

The Petitioner has not asked this Court to review general principles of tribal sovereign immunity. No question that will be of particular consequence to Indian tribes other than the Rosebud Sioux Tribe is presented in this case. Val-U Construction respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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